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FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Review of the Guidelines on fair treatment of seafarers in the event of a maritime accident

Submitted by the United States, Canada, Spain, the Netherlands and France

SUMMARY

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| <i>Executive summary:</i> | This document contains drafting suggestions for proposed amendments to the Guidelines on fair treatment of seafarers in the event of a maritime accident |
| <i>Action to be taken:</i> | Paragraph 30 |
| <i>Related documents:</i> | Circular letter No.2711; resolution LEG.3(91); LEG 91/12, LEG 90/15 and LEG 89/16 |

Background

1 The ninety-first session of the Legal Committee adopted resolution LEG.3(91), which annexed Guidelines on the fair treatment of seafarers in the event of a maritime accident and agreed on the need to keep the Guidelines under review. The Legal Committee also “decided to establish, at its next session, an *ad hoc* working group to be tasked with reviewing the Guidelines, taking into account the comments made by the delegations which had expressed concerns at this [the ninety-first] session and any others that may be submitted intersessionally.” (document LEG 91/12, paragraph 161).

2 The concerns noted included:

- .1 “[T]here should be a clear statement that the guidelines were not intended to apply following incidents committed with criminal intent, as previously decided by the Committee at its eighty-ninth session.” (document LEG 91/12, paragraph 152);
- .2 “[T]he definition of ‘maritime accident’ might be susceptible to misinterpretation and confusion, as it lacked an expected reference to actual or potential damage or injury.” (document LEG 91/12, paragraph 152);
- .3 “[T]he guidelines should be interpreted and applied in conformity with a State’s domestic law.” (document LEG 91/12, paragraph 152);
- .4 “[T]he right to avoid self-incrimination . . . should be addressed, bearing in mind the existence of two types of investigation, respectively aiming at clearly

establishing the circumstances of a maritime casualty and at ascertaining criminal responsibility for its occurrence.” (document LEG 91/12, paragraph 155);

- .5 “It should be clarified that the obligation to pay wages rests ultimately upon the shipowner/employer and not upon States.” (document LEG 91/12, paragraph 155);
- .6 “[P]aragraph 7 excludes the application of the guidelines to warships or naval vessels only, without making reference to vessels operated by States for non-commercial purposes.” (document LEG 91/12, paragraph 155); and
- .7 “[S]ubparagraph 9.21 proclaims the principle of exclusive flag State jurisdiction in matters of collision or other incidents, and in so doing ignores the jurisdictional rights of other States established by international treaties.” (document LEG 91/12, paragraph 155).

3 Recognizing that the Guidelines on the fair treatment of seafarers in the event of a maritime accident have also been adopted by the ILO Governing Body, and that any Legal Committee recommendations for amendments to the Guidelines will be sent to the 297th Session of the ILO Governing Body for review and adoption, the co-sponsors of this paper recommend a few critical amendments to the Guidelines. These amendments, described below and incorporated into a proposed draft text at annex, are limited in scope, in order to facilitate efficient and expeditious review and adoption, yet comprehensive enough to allow more Governments to fully implement the Guidelines. Widespread implementation will help ensure that accident investigations remain effective in preserving a safe working environment for seafarers, as well as providing for their consistent and fair treatment.

Relationship with States’ domestic laws

4 It is recommended that paragraph 4 be amended by deleting the words “do not seek” and replacing them with the words “are to be interpreted in conformity and in accordance with States’ domestic laws so as not”.

5 To be workable in practice, the Guidelines must be interpreted and applied in conformity with, and as provided for in, a State’s domestic law. Although there is language to this effect in the Introduction to the Guidelines, the concept could be much clearer, and the proposed amendment would provide the necessary clarity. This clarification will help avoid misunderstandings, which is particularly important given that the Guidelines will potentially apply to thousands of investigations conducted every year.

Application to non-commercial vessels

6 It is recommended that paragraph 7 be amended by adding, before the full stop the words “or other vessels owned or operated by a State and used for the time being, only on government non-commercial service, unless the flag State determines otherwise”.

7 The application of the Guidelines must take into consideration that government ships operated for non-commercial purposes are entitled to certain immunities and privileges similar to warships. The flag State’s government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships and other craft owned or operated by a State and used only on government service should be assimilated to warships. The text proposed is consistent with the traditional text historically used in IMO instruments.

Definition of “maritime accident”

8 It is recommended that the definition of “maritime accident” in paragraph 8 be amended by inserting, before the phrase “which may result in the detention of seafarers”, the phrase “which results in or has the potential to result in an unforeseen outcome such as damage to the ship, its cargo, or the environment, or injury to any individual or damage to property and”.

9 The definition of “maritime accident” may be susceptible to misinterpretation and confusion, as it lacks an expected reference to actual or potential damage or injury. Some may argue that this definition extends to incidents which are far removed from what the Legal Committee may have envisioned. It is important to have a clear definition of the term “maritime accident” because, although States are free to apply the principles contained in these Guidelines in other circumstances, the terms of reference for creation of the Guidelines limited the scope of application to maritime accidents.

Wages

10 It is recommended that paragraph 9.5 be amended by deleting the word “wages,”.

11 It is recommended that paragraph 9.5*bis* be added: “make its best efforts, as appropriate, to ensure that wages are being provided by the shipowner/employer to the detained seafarer.”

12 It is recommended that paragraph 10.5 be amended by deleting the word “wages,”.

13 It is recommended that paragraph 10.5*bis* be added: “make its best efforts, as appropriate, to ensure that wages are being provided by the shipowner/employer to the detained seafarer.”

14 Although the responsibility for providing seafarer wages lies with the shipowner/employer, flag, port, and coastal States acknowledge that States should make their best efforts, as appropriate, to ensure that shipowners/employers meet their responsibilities to seafarers.

Rights to remain silent and to avoid self-incrimination

15 It is recommended that paragraph 9.7 be amended by deleting the phrase “are advised of their right to independent legal advice, are provided access to independent legal advice, are advised of their right not to incriminate themselves and their right to remain silent” and replacing that phrase with “are advised of their rights which are recognized by the domestic law of the coastal State including any applicable right to independent legal advice and any applicable right not to incriminate themselves in criminal investigations instigated against them,”.

16 It is recommended that the *chapeau* of paragraph 12 be amended by replacing the word “the” with the words “any applicable” before the phrase “right to avoid self-incrimination”.

17 It is recommended that paragraph 13.2 be amended by inserting “rights, including any applicable” before “right not to self-incriminate”.

18 It is recommended that paragraph 13.4 be amended by replacing the word “their” with the words “any applicable” before the phrase “right not to self-incriminate”.

19 Consistent with paragraph 1.3.3 of the Code for Investigation of Marine Casualties and Incidents contained resolution A.849(20), free flow of information with a degree of immunity from self incrimination is incorporated into some States' domestic laws for investigation of marine casualties. Further, paragraph 9.7 appears to create a right to remain silent that is independent of the right against self-incrimination. Implemented literally, this provision would prohibit subpoenas and create a "right not to get involved." This is in direct conflict with some States' laws which do require witnesses to give testimony absent a real threat of self-incrimination. It would deprive seafarers of important rights, such as the right to obtain evidence necessary to clear them of wrongdoing, or to determine who was responsible for their injury.

Communication

20 It is recommended that paragraph 9.10 be amended by deleting the phrase "are provided with the means to communicate privately with all of the following parties" and replacing the deleted phrase with "have the possibility, according to domestic law, to have the following parties informed of their detention"; deleting the phrase "the Embassy or Consulate of the flag State and of their country of residence or nationality; and", and deleting the phrase "legal representatives;"

21 It is recommended that paragraph 9.10*bis* be added:

.10*bis* ensure that all seafarers detained are provided with the means to communicate privately with the following parties:

- the Embassy or Consulate of the flag State and of their country of residence or nationality; and
- legal representatives;

22 The amendments to paragraph 9.10 reflect the widely-held principle that, although detained seafarers involved in a maritime accident investigation do have a right to communicate privately with legal representatives and the Embassy or Consulate of the flag State or of their country, detained seafarers may not have an absolute expectation of privacy when communicating, during an investigation, with family members, welfare organizations, the shipowner, and trade unions. Further the amendments reflect that States' domestic laws vary regarding the communication and notification rights of detained seafarers.

Jurisdictional rights of States

23 It is recommended that article 9.21 be amended by deleting the word "exclusive".

24 It is recommended that article 9.21 be amended by adding, before the semicolon, the phrase "concerning a ship on the high seas".

25 The amendments to paragraph 9.21 are intended to align the text of the Guidelines more closely with article 97 of the United National Convention on the Law of the Sea and customary international law.

Relationship with relevant IMO instruments

26 It is recommended that paragraph 10.3 be amended by inserting before the phrase“, in any casualty investigation” the phrase “and in accordance with all relevant IMO instruments”.

27 The addition of this phrase complements the current text of paragraph 10.3, which enumerates a particular IMO instrument to be followed, as appropriate. Including the more general additional text would highlight other applicable IMO instruments, such as the International Convention for the Safety of Life at Sea and the International Convention on Load Lines.

Guidelines for shipowners

28 It is recommended that the words “an overriding” be replaced by the words “a fundamental”.

29 This drafting suggestion is meant to correct a potential misinterpretation of the shipowners’ duty to protect the rights of seafarers. It retains the principle that the duty of shipowners to protect the rights of seafarers is significant and important, while not implying that the protection of seafarer rights is the only duty of shipowners.

Action requested of the Legal Committee

30 The Legal Committee is invited to consider the comments in this paper and adopt the amendments proposed, as appropriate.

ANNEX

Key:

- Proposed amendments are in **brackets in bold font**.
 - Proposed deletions are ~~lined out~~.
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Proposed Amendments to Guidelines on the fair treatment of seafarers in the event of a maritime accident

I Introduction

1 It is recommended that these Guidelines be observed in all instances where seafarers may be detained by public authorities in the event of a maritime accident.

2 Seafarers are recognized as a special category of worker and, given the global nature of the shipping industry and the different jurisdictions that they may be brought into contact with, need special protection, especially in relation to contacts with public authorities. The objective of these Guidelines is to ensure that seafarers are treated fairly following a maritime accident and during any investigation and detention by public authorities and that detention is for no longer than necessary.

3 These Guidelines have been prepared in accordance with resolution A.987(24)* on Guidelines on fair treatment of seafarers in the event of a maritime accident adopted on 1 December 2005 by the Assembly of the International Maritime Organization. This resolution is attached at annex to these Guidelines.

4 These Guidelines **are to be interpreted in conformity and in accordance with States' domestic laws so as not to** ~~do not seek~~ to interfere with any State's domestic, criminal, or civil law processes nor the full enjoyment of the basic rights of seafarers, including those provided by international human rights instruments, and the seafarers' right to humane treatment at all times.

5 Seafarers are entitled to protection against coercion and intimidation from any source during or after any investigation into a maritime accident.

6 The investigation of a maritime accident should not prejudice the seafarer in terms of repatriation, lodgings, subsistence, payment of wages and other benefits and medical care. These should be provided at no cost to the seafarer by the shipowner, the detaining State or an appropriate State.

7 These Guidelines do not apply to warships or naval auxiliaries **or other vessels owned or operated by a State and used for the time being, only on government non-commercial service, unless the flag State determines otherwise.**

II Definitions

8 For the purposes of these Guidelines,

“seafarer” means any person who is employed or engaged or works in any capacity on board a ship;

“shipowner” means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities of the shipowner, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner;

“maritime accident” means any unforeseen occurrence or physical event connected to the navigation, operations, manoeuvring or handling of ships, or the machinery, equipment, material, or cargo on board such ships **which results in or has the potential to result in an unforeseen outcome such as damage to the ship, its cargo, or the environment, or injury to any individual or damage to property and** which may result in the detention of seafarers;

“investigation” means an investigation into a maritime accident;

“detention” means any restriction on the movement of seafarers by public authorities, imposed as a result of a maritime accident, including preventing them leaving the territory of a State other than the seafarer’s country of nationality or residence.

III Guidelines for the port or coastal State

9 The port or coastal State should:

- .1 take steps so that any investigation they conduct to determine the cause of a maritime accident that occurs within their jurisdiction is conducted in a fair and expeditious manner;
- .2 co-operate and communicate with all substantially interested States, shipowners, and seafarers, and take steps to provide seafarers’ representative organizations in the port or coastal State with access to seafarers;
- .3 take steps to ensure that adequate measures are taken to preserve human rights of seafarers at all times, and the economic rights of detained seafarers;
- .4 ensure that seafarers are treated in a manner which preserves their basic human dignity at all times;
- .5 take steps to ensure/verify that adequate provisions are in place to provide for the subsistence of each detained seafarer including, as appropriate, ~~wages~~, suitable accommodation, food and medical care;
- .5bis make its best efforts, as appropriate, to ensure that wages are being provided by the shipowner/employer to the detained seafarer.**
- .6 ensure that due process protections are provided to all seafarers in a non-discriminatory manner;

- .7 ensure that seafarers are, where necessary, provided interpretation services, and **are advised of their rights which are recognized by the domestic law of the coastal State including any applicable right to independent legal advice and any applicable right not to incriminate themselves in criminal investigations instigated against them, ~~are advised of their right to independent legal advice, are provided access to independent legal advice, are advised of their right not to incriminate themselves and their right to remain silent~~**, and, in the case of seafarers who have been taken into custody, ensure that independent legal advice is provided;
- .8 ensure that involved seafarers are informed of the basis on which the investigation is being conducted (i.e., whether it is in accordance with the IMO Code for the Investigation of Marine Casualties and Incidents (resolution A.849(20) as amended by resolution A.884(21) or as subsequently amended), or pursuant to other national legal procedures);
- .9 ensure that the obligations of the Vienna Convention on Consular Relations, including those relating to access, are promptly fulfilled and that the State(s) of the nationality of all seafarers concerned are notified of the status of such seafarers as required, and also allow access to the seafarers by consular officers of the flag State;
- .10 ensure that all seafarers detained **have the possibility, according to domestic law, to have the following parties informed of their detention, ~~are provided with the means to communicate privately with all of the following parties:~~**
- family members;
 - welfare organizations;
 - the shipowner;
 - trade unions;
 - ~~— the Embassy or Consulate of the flag State and of their country of residence or nationality; and~~
 - **legal representatives;**
- .10bis ensure that all seafarers detained have the possibility to communicate privately with the following parties:**
- **the Embassy or Consulate of the flag State and of their country of residence or nationality; and**
 - **legal representatives;**
- .11 use all available means to preserve evidence to minimize the continuing need for the physical presence of any seafarer;

- .12 ensure decisions taken pursuant to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/78) are consistent with the provisions of Annex 1 (Regulations for the prevention of pollution by oil), Regulation 11;
- .13 promptly conduct interviews with seafarers, when done for a coastal State investigation following a maritime accident, taking into account their physical and mental condition resulting from the accident;
- .14 take steps to ensure that seafarers, once interviewed or otherwise not required for a coastal State investigation following a maritime accident, are permitted to be re-embarked or repatriated without undue delay;
- .15 consider non-custodial alternatives to pre-trial detention (including detention as witnesses), particularly where it is evident that the seafarer concerned is employed in a regular shipping service to the detaining port or coastal State;
- .16 promptly conclude its investigation and, if necessary, charge seafarers suspected of criminal actions and ensure that due process protections are provided to all seafarers subsequent to any such charge;
- .17 have in place procedures so that any damage, harm or loss incurred by the detained seafarer or by the shipowner, in relation to the detention of that particular seafarer, attributable to the wrongful, unreasonable or unjustified acts or omissions of the detaining port or coastal State are promptly and fully compensated;
- .18 insofar as national laws allow, ensure that a process is available for posting a reasonable bond or other financial security to allow for release and repatriation of the detained seafarer pending resolution of any investigatory or judicial process;
- .19 take steps to ensure that any court hearing, when seafarers are detained, takes place as expeditiously as possible;
- .20 take steps to ensure decisions taken are consistent with generally applicable provisions of the law of the sea;
- .21 take steps to respect the generally accepted provisions of international maritime law regarding the principle of ~~exclusive~~ flag State jurisdiction in matters of collision or other incidents of navigation **concerning a ship on the high seas**; and
- .22 take steps to ensure that no discriminatory or retaliatory measures are taken against seafarers because of their participation during investigations.

IV Guidelines for the flag State

10 The flag State should:

- .1 take steps to ensure that any investigation to determine the cause of a maritime accident is conducted in a fair and expeditious manner;

- .2 co-operate and communicate with all substantially interested States, shipowners, and seafarers, and take steps to provide seafarers' representative organizations with access to seafarers;
- .3 where appropriate, participate directly, under the IMO Code for the Investigation of Maritime Casualties and Incidents (IMO Assembly resolution A.849(20) as amended by resolution A.884(21) and as may be subsequently amended) **and in accordance with all relevant IMO instruments**, in any casualty investigation;
- .4 assist in ensuring that shipowners honour obligations to seafarers involved in a maritime accident or any investigation;
- .5 ensure/verify that adequate provisions are in place to provide for the subsistence of each detained seafarer, including, as appropriate, ~~wages~~, suitable accommodation, food and medical care;
- .5bis make its best efforts, as appropriate to ensure that wages are being provided by the shipowner/employer to the detained seafarer.**
- .6 ensure that shipowners honour obligations to co-operate in any flag, coastal or port State investigation following a maritime accident;
- .7 assist seafarers to secure fair treatment, and assist shipowners in the event of an investigation by a port or coastal State;
- .8 fund the repatriation of seafarers, where necessary, following the aftermath of a maritime accident in instances where shipowners fail to fulfil their responsibility to repatriate;
- .9 assist, as provided for in national law, in the issuance and service of process and the return to a port or coastal State of seafarers subject to its jurisdiction who are needed solely as witnesses in any proceeding following a maritime accident;
- .10 take steps to ensure that its consular officers are permitted access to the involved seafarers, irrespective of their nationality;
- .11 take all necessary measures to ensure the fair treatment of seafarers who were employed or engaged on a vessel flying its flag. This may ultimately include utilizing international dispute resolution mechanisms, which can secure the prompt release of vessels and crews upon the posting of a reasonable bond or financial security; and
- .12 take steps to ensure that no discriminatory or retaliatory measures are taken against seafarers because of their participation during investigations.

V Guidelines for the seafarer State

- 11 The seafarer State should:

- .1 co-operate and communicate with all substantially interested States, shipowners, and seafarers, and take steps to provide seafarers' representative organizations with access to seafarers;
- .2 monitor the physical and mental well-being and treatment of seafarers of their nationality involved in a maritime accident, including any associated investigations;
- .3 fund the repatriation of their national seafarers, where necessary, following the aftermath of a maritime accident in instances where shipowners and the flag State fail to fulfil their responsibility to repatriate;
- .4 assist, as provided for in national law, in the service of process and the return to a port or coastal State of seafarers subject to its jurisdiction who are needed solely as witnesses in any proceeding following a maritime accident;
- .5 take steps to ensure that its consular officers are permitted access to the involved seafarers;
- .6 take steps to provide support and assistance, to facilitate the fair treatment of nationals of the seafarer State and the expeditious handling of the investigation;
- .7 take steps to ensure that all funds remitted by shipowners, the detaining State, or any other State for detained seafarers, or for support of those seafarers' families, are delivered for the intended purposes; and
- .8 take steps to ensure that no discriminatory or retaliatory measures are taken against seafarers because of their participation during investigations.

VI Guidelines for shipowners

12 With regard to investigations, shipowners have ~~an overriding a fundamental~~ duty to protect the rights of the seafarers employed or engaged, including ~~the-any applicable~~ right to avoid self-incrimination and to take steps to ensure their fair treatment, and should:

- .1 take all available measures to ensure that no discriminatory or retaliatory measures are taken against seafarers because of their participation during investigations and take steps to ensure that such conduct by other entities is not tolerated;
- .2 co-operate and communicate with all substantially interested States, other shipowners, as appropriate, and seafarers, and take steps to provide seafarers' representative organizations with access to seafarers;
- .3 take action to expedite the efforts of a port, coastal, or flag State investigation;
- .4 take steps to encourage seafarers and others under their employment, with due regard to any applicable rights, to co-operate with any investigation;
- .5 use all reasonable means to preserve evidence to minimize the continuing need for the physical presence of any seafarer;

- .6 fulfil their obligation in relation to the repatriation of, or take steps to re-embark, the seafarers; and
- .7 ensure/verify that adequate provisions are in place to provide for the subsistence of each seafarer, including, as appropriate, wages, suitable accommodation, food and medical care.

VII Guidelines for seafarers

13 Seafarers should:

- .1 take steps to ensure, if necessary, that they have appropriate interpretation services;
 - .2 take steps to ensure that they fully understand their **rights, including any applicable** right not to self-incriminate, and that they fully understand that when statements are made to port, coastal or flag State investigators, these may potentially be used in a future criminal prosecution;
 - .3 take steps to ensure, if they consider it necessary, that they have arrangements for access to legal advice prior to deciding whether to give statements to port, coastal or flag State investigators; and
 - .4 participate in an investigation, to the extent possible, having regard to ~~their~~ **any applicable** right not to self-incriminate, with port, coastal or flag State investigators, by providing truthful information to the best of their knowledge and belief.
-